98-305

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

DANIEL J. GREY,
Petitioner,

V.

CARRIER/UNITED TECHNOLOGIES CORPORATION,
Respondent.

On Petition For A Writ Of Certiorari To the United States Court of Appeals For The Second District

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether summary judgment is properly granted to defendant when plaintiff has established prima facie, and presented missed evidence of pretext, pervasive harassment and hostility, and retaliation.

2. Whether a plaintiff's case is jeopardized, and risks being dismissed if Court is one of the most heavily docketed courts in the country.

3. Whether Court should increase its support of A.D.E.A. to protect the increasing number of elder workers against growing abuses in the workplace, by stronger application of F. R 56.

4. Whether 7th Amendment "right of trial by jury" had been obstructed.

LIST OF ALL PARTIES

The parties to the proceedings in the Second Circuit Court of Appeals were petitioner DANIEL J. GREY, formerly a Technical Writer for Carrier Air Conditioning Company, located in Syracuse, New York, a wholly owned subsidiary of United Technologies Corporation, with headquarters in Farmington, Connecticut; and respondent CARRIER/UTC CORPORATION.

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INTRODUCTION

The law is clear on whether there has been age discrimination as stated under the Age Discrimination in Employment Act (ADEA) of 1967. After plaintiff has show the existence of a prima face case the employer can present a legitimate, nondiscriminatory reason for its action against the employee. To counter the employer's reason, plaintiff must then present convincing evidence the employer's reason was pretextual.

Claims of harassment and hostility in the work place may arise. These claims must be shown to be pervasive. Employer retaliation for filing a complaint with government agencies is also unlawful. This claim, also within the scope of the ADEA, must include believable evidence that retaliation took place.

There are also questions of preponderance of the evidence, whether it be circumstantial or statistical, or both.

These matters must be weighed and examined by the Court. Through examination the Court must determine whether there are facts worthy of a jury trial. If the Court believes there are not, the case will be dismissed without going to trial, at a summary judgment hearing.

Fed. R. Civ. P. 56 is very clear on summary judgment matters (p 5, App. 29). If the plaintiff appeals the lower Court's decision to the Court of Appeals, that Court may reexamine the facts and reverse the decision of the lower Court, or affirm that Court's decision.

In this case, the District Court said; there was no age discrimination because even allowing that prima facie may have been met there was no hostility, that it appeared to be only the plaintiff's feeling there was hostility, that there was no pervasiveness of harassment, no evidence of pretext in the reason employer discharged plaintiff, no evidence of retaliation, barely any evidence or triable facts worthy of jury trial. These were the views presented by defendant although aware of the evidence. The Court did not see even an allowable inference of discrimination.

For whatever reason, the Court missed all of the plaintiff's important evidence, dismissing the case under summary judgment in approximately 15 minutes. The Judge read his decision from notes, seemingly with his decision made prior to entering the courtroom.

On appeal, after oral argument which lasted approximately 10 minutes for each

counsel, the Court of Appeals announced its affirming decision after several days. In its written opinion (App. 37) the Court of Appeals merely restated the District Court opinions. Again, for whatever reason, the Court of Appeals did not see plaintiff's important evidence.

During oral argument at 2d Circuit defendant was erroneous in stating that plaintiff had poor performance reviews from Savin from the outset in 1987, and from a previous supervisor, misrepresenting facts best left to a jury.

Petitioner respectfully prays that this Court issue a Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States District Court, Northern District New York in Daniel J. Grey v. Carrier/United Technologies is unreported and is reprinted in the Appendix to this Petition at App. 34.

The opinion of the Second Circuit is unreported and is reprinted in the Appendix to this Petition at App. 37.

JURISDICTIONS

Action filed in U. S. District Court in Northern District of NY under 28 U.S.C. § 1331 and 1337, and 29 U.S.C. § 216(b),626(b),(c).

Appellate jurisdiction invoked under District Court dispositive order pursuant to 28 U.S.C. § 1291.

Second Circuit filed its judgment on May 18, 1998.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Seventh Amendment of the United States Constitution provides:

> In suits at common law, where the value of the curency shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise examined in any Court of the United States, than according to the rules of the common law. (App. 7, 28).

2. Fed. R. Civ. P. 56(c) provides in relevant part:

> Summary judgment is appropriate only where there is "no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law," *Schwabenbauer*.

See App. 29 for additional provisions of F.R. 56.

STATEMENT OF THE CASE

On Friday Sept. 3, 1993, plaintiff was told by his supervisor, Savin, with human resources representative, Chamberlain, present, this was his last day of work. He had heard earlier in the week there was a rumor the department was being eliminated. He asked only one question of Savin, "The whole department is being eliminated?" She answered, Yes. The department had 11 workers. DG dep p 269.

After 2 weeks, while attending the company's outplacement center for displaced workers, plaintiff noticed only 2 or 3 of the members intermittently in attendance and learned that some had been offered extended termination dates for up to 3 months. In approximately 2 more weeks he learned the department was being reinstated under another division. Soon after he noticed he (age 64) and one younger member were the only two no longer at the outplacement center. App. 5.

On Oct. 19, 1993, plaintiff filed an age discrimination complaint with N.Y.S. Division of Human Rights (NYSHDR) which led to automatic filing with the U.S. Equal Employment Opportunity Commission (EEOC). The Amended Complaint claims were: 1) That supervisor Savin had created a hostile work environment and sub-

jected him to unwelcome harassment prompted by his age, which was not useful to his job performance. 2) That plaintiff was discharged on Sept. 3, 1993, with official date being Oct. 1, 1993, while several younger employers were retained, with age being a determining factor. 3) That the company later officially rehired the majority of the younger workers, and refused to rehire plaintiff, with age being a determining factor. 4) That the company retaliated against the plaintiff by refusing to rehire him after learning he had filed a complaint. App 25. Plaintiff sought lost pay and benefits, and costs. Although not claimed in the case, he also suffered loss of his severance pay when he was told it could not be sent to him "unless he withdrew his complaint."

On Oct. 20, 1993, NYSDHR notifed the company of plaintiff's complaint.

On. Oct. 27, 1998, EEOC notified the company of plaintiff's complaint.

On Nov. 8, 1998, the EEOC notification was date-stamped into Herb Smith's office. Mr. Smith was a human resources and diversity training manager, with expertise in equal employment opportunity (EEO) and was involved in the department's rehiring decisions. (App. 26).

On June 13, 1997, order dated June 30, 1997, plaintiff's case was dismissed by the Honorable Frederick J. Scullin, Jr. of the U.S. District Court for the Northern District of N.Y. for lack of evidence, nonpervasive hostility, stray age-related supervisory remarks, the company's legitimate nondiscriminatory reason for their adverse action, no evidence of retaliation, no inference of age discrimination, and the Court's opinion plaintiff's claims were based on only his feelings he was discriminated against, that the relationship between him and his supervisor had seemingly risen to one of animosity.

On June 30, 1997, the Court Order on summary judgment was filed. App 1, 34.

On March 2, 1998, the case was heard in oral argument by the 2nd Circuit Court of Appeals in N.Y. City. App 1.

On March 13, 1998, 2nd Circuit filed its order of dismissal affirming the District Court decision, issued as mandate May 25, 1998. App 1, 37.

On May 18, 1998, the 2nd Circuit denied rehearing. App 1, 41.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REESTABLISH THAT UNDER AGE DISCRIMINATION IN EMPLOYMENT ACT CLOSE SCRUTINY OF ALL EVIDENTIARY FACTS IS NECESSARY IN CONCERT WITH FEDERAL RULE 56 ON SUMMARY JUDGMENT PROCEEDINGS TO ASCERTAIN EVIDENCE OF TRIABILITY

The Court should acknowledge the need to scrutinize with care all evidence in A.D.E.A. cases that can encompass a plaintiff's charges of pretext, harassment, hostility, and retaliation, and the need to increase the public good, App 31.

The Court should recognize that when it expresses "there is no question as to the facts as to an employee's prior performance," simply by agreeing with what a supervisor has lately placed on the employee's performance evaluations, a powerful tool then exists for an employer to use deviously to discharge an employee for any reason; age, religion, color, race, weight, appearance, politics, marital status, number of dependents, personality, whatever reason that does not appeal to a supervisor. This power of the performance evaluation, App. 21, with support of Court decision, therefore renders A.D.E.A. unenforceable.

Court should closely examine the performance evaluations and work record of the plaintiff which defendant claims are subpar, rather than merely accepting these claims as stated by defendant. Much important evidence offered by the plaintiff has been overlooked by the Court, evidence plaintiff believes should be decided by jury trial. This evidence includes:

1. The 7-year handwritten record of plaintiff's pervasive harassment and hostility by Savin. DG dep. p 195, 235. Sample in Exbt F (opp. to SJ).

2. The date-stamped letter to Herb Smith, prior to rehiring of employees. Exbt K.

3. The first articulation by company that poor performance was the reason for their adverse action against him, 7 months after receiving notification of complaint from NYSDHR. (response to NYSDHR).

4. Evaluation forms produced in discovery for all dept. members showing the same types of criticisms for all (records obtained in discovery).

5. Manuscript work samples showing normal criticisms for all, plaintiff and those rehired. Exbt H.

6. Plaintiff's production output record showing he frequently led the department (plaintiff affid p 4).

7. Savin's hiring record which showed her preference for young employees in her own age category (20s-30s), particularly of her own gender. (employee records from discovery).

8. Attendance record showing plaintiff lost only one day of work in 7 years under Savin, for illness. (time sheets produced for discovery).

9. Taking assignments away from plaintiff to give to new, young writers. (plaintiff affid., dep p 124, 251).

10. Telling plaintiff the whole department was eliminated when it was not. Planning a writing/proofreading position for a younger technical writer when plaintiff had many more years experience. (Savin dep p 59 and Excel committee chart).

11. Defendant affidavits by managerial-level employees who had no personal knowledge of plaintiff. App. 23.

12. A note by the human resources representative stating she had been advised to notify plaintiff he could not be sent his

severance check unless he withdrew his complaint, obstructing his Seventh Amendment right of trial by jury. (discovery document, App. 7, 27.)

13. Final exit form given to plaintiff showing he was discharged because of job elimination. Boxes for performance or cause were not checked. Exbt E.

14. Strong suggestion of scam in the devious, disparate manner that Savin announced the department elimination, when plaintiff was not present. Whitton dep p 47, Savin dep p 54, App. 5.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

Dated: August 17, 1998.

Respectfully submitted,

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App. 1

Daniel J. GREY, Plaintiff-Appellant,

v.

Carrier/United Technologies, Corp.

No. 94-CV-1126.

in the United States District Court,
Northern District of New York.

Summary Judgment Hearing and Decision
June 13, 1997.
Order Dated June 30, 1997.

No. 97-7988.

in the United States Court of Appeals,
Second District.

Argued and Submitted March 2, 1998.
Decided March 13, 1998.
Issued as Mandate May 25, 1998.

Appeal from the United States District Court for the Northern District of New York.

Before NEWMAN, CABRANES, and MERRITT, Circuit Judges.

Rehearing petition denied May 18, 1998.

BACKGROUND

Plaintiff was an employee of Carrier Corporation for 17 years, 5 years as a sales promotion copywriter and trade show manager, and 12 years as a senior technical writer. He had always received excellent performance evaluations from his managers. In 1985 his department was downsized for the first time from 13 to 5 personnel. Plaintiff was downsized but his manager realized a mistake had been made in headcount and plaintiff was asked to remain. Of the several technical writers who lost their jobs, plaintiff was the one chosen to remain. DG dep p 99, 131.

A new manager, Catherine Savin, took over in 1987. Plaintiff alleges she was hyper-critical, fault seeking, difficult to communicate with, and created a hostile workplace environment. She forced out one co-worker (Doran, age 40), then another (Lehman, late 50s) who filed an age discrimination suit and lost. (DG dep p 263, 301). Plaintiff was not spared Savin's hostility, harassment, insults, humiliation, and threats which he alleges were based on his age. He kept voluminous handwritten notes in the event he might some day need them with upper management. DG dep p 195, 235, sample in Exbt F opp. to SJ.

Savin rebuilt the department from 5 to 11 personnel, plus one or two temps.

From 1987 through 1991 she hired only employees in her own age bracket, 20s to 30s, and gender. During the last 2 years of plaintiff's employ she hired two men in the same age bracket, 20s - 30s, and one woman (50s) (DG dep p 220). Plaintiff was 64, the oldest and longest tenured and by far the best work producer until Savin rebuilt her staff and her harassment increased. She began taking many job assignments away from plaintiff without explanation, giving them to the new, younger writers (DG dep p 124, 251), reducing plaintiff's output record. At times she made age-related remarks.

She denied him certain employee rights, such as not giving him a survey form to participate in the first employees' satisfaction survey (DG dep p 164, 302), denied him raises during his last 3 years, reduced his contact at meetings, denied him training given to younger writers, and denied him freedom of interface with other departments he had worked with for years.

Plaintiff frequently took single day vacation days to avoid work pile-up. At times on those days Savin conducted business and held department meetings and would not share new announcements with plaintiff when he returned. Unknown to Savin's own manager, Connie Whitton (CW dep p 47), on August 30, 1993 Savin held a department meeting to annnounce the pending elimination of the department. (DG dep p 266). Whitton stated she herself would not have held such a meeting. Savin did not share this traumatic announcement with plaintiff during the remaining 4 days of that week. App 18.

He did not have the benefit of hearing the news in advance as did his coworkers, in which to inform his family and possibly canvas for another position in the company.

A co-worker asked plaintiff if he heard the rumor. Another told him it wasn't a rumor but a fact. On Fri. Sept. 3 he was called to Savin's office with human resources representative, Chamberlain, present and was told by Savin it was his last day. Plaintiff asked only one question, "The whole department is being eliminated?" The answer was Yes. (DG dep p 269).

Plaintiff had no complaint at this point. He accepted a department downsizing as a legitimate business decision. Plaintiff attended a daily outplacement center provided by the company to assist displaced workers. As days and weeks passed, plaintiff discovered 3 of the 11 employees "supposedly" downsized were not. Four others were given extended termination dates (DG dep p 275) of up to 3 months therefore continued to receive their income, one chose private employment, another returned to college, and only 2 continued at the outplacement center, described differently by defendant.

The department was reinstated under a different marketing division and disparately treated younger workers were offered their jobs back except plaintiff, the oldest, and one younger worker.

Plaintiff realized he had been duped by Savin who twice had threatened she would not be forced to work with him. He had been victimized by her willful scam to engineer his removal. Plaintiff had filed his age discrimination complaint with NY State Division of Human Rights on Oct. 19, 1993 and with EEOC when he realized the department had not been eliminated as he was told. (DG dep p 276).

Company was notified of complaint

Oct. 20, 1993, again on Nov. 8, 1993 to Herb Smith's office (Exbts J,K opp to summ judg). Letters to workers offering to rehire them were mailed Nov. 22, 1993 (Exbts L-N opp to summ judg). Retaliation was clearly established.

Company responded to plaintiff's complaint May 2, 1994, seven months later, stating for the first time plaintiff was released and not rehired due to poor performance (company response), although plaintiff exit form (Exbt E) was checked "job elimination". Boxes for "cause" and "performance" were not checked.

Savin deposition also indicated she had never considered laying off plaintiff (CS dep p 97).

Plaintiff's claim of employer pretext was clearly established by these events.

The concept of performance should be closely analyzed. Technical writing performance consists of numerous abilities App. 23) excelled in by plaintiff.

Plaintiff also found himself disadvantaged by several changes of counsel due to extenuating circumstances, which delayed his case at times and caused transition difficulties.

Further retaliation took place when company human resources representative, Chamberlain, telephoned plaintiff at home and told him they would not send him his severance pay unless he withdrew his complaint. Chamberlain's note, obtained through discovery, was dated Dec. 10, 1993, and read:

> "Advised Dan Grey I was advised he had EEOC charge against Carrier and we could not process waiver (agreement not to sue) until we received notification that charge was withdrawn."
> - Luella (Chamberlain)

....with copy to Herb Smith (human resources manager/manager of diversity training.) DG dep p 277, 279.

In addition to showing the company's retaliatory mindset, this act served to interfere with plaintiff's Seventh Amendment right to trial by jury. App. 27.

> "In suits at common law, where the value of the currency shall exceed twenty dollars, the right of trial by jury shall be preserved."

The waiver agreement also became invalid when defendant did not reciprocate.

Plaintiff argues he met all requirements for prima facie, and established his claims of employer pretext, retaliation, pervasive harassment, and a hostile work environment.

In summary judgment hearing, June 13, 1997, the district court dismissed in its entirety all eight causes of action in plaintiff's case, four of which are duplicated under NY State Human Rights law. The four causes of action identified by the Court as set forth in transcript were:

I) Hostile work environment based on age discrimination, with emphasis on severity and pervasiveness.

II) Age discrimination based on plaintiff's initial layoff.

III) Age discrimination based on decision not to rehire plaintiff.

IV) Retaliation for filing of complaint.

DISCUSSION

Plaintiff alleges the District Court has overlooked many triable facts and issues related to dismissal of the above four charges, which should be given close

scrutiny in accordance with F R. Civ. P 56 and fully evaluated. Many details surrounding plaintiff's allegations have been not been considered. These triable facts are set forth below regarding each of the four dismissed charges.

I) The Hostile Work Environment Claim

The Court has minimized plaintiff's claim of hostility in the workplace, and disregarded its pervasiveness. As stated in plaintiff's deposition, since Savin became his supervisor in 1987, plaintiff kept a handwritten 7-year record of his difficulties with her, as the events occurred, for documentation of her hostility and harassment in the event his notes might be needed some day with upper management. p 10, App 11, 42.

The notes were requested by and given to defendant during discovery. They were too numerous for total placement in plaintiff's brief opposing summary judgment, and are discussed at length in plaintiff deposition (p 195, 235), a sample of which appears as Exbt F in opposing brief. The notes bear review by the reasonable trier of fact to demonstrate overwhelming pervasiveness.

Court SJ transcript (p 5) states plaintiff has no allegations Savin did

not treat younger employees as she treated him. Plaintiff's allegations in his deposition (pp 142, 143) do indicate disparate treatment.

Court transcript p 5 states plaintiff did not submit evidence as to how Savin critiqued other employees. Plaintiff submitted copies of performance evaluations of other employees in his opposition to summary judgment that demonstrate Savin frequently had the same criticisms for other employees as for plaintiff, yet the other employees were rehired. Also demonstrated is a frequent bolstering by Savin of other employee's evaluations with meaningless mundane comments which are noticeably absent in plaintiff evaluations.

Savin, herself, admitted to juggling plaintiff's evaluations as she pleased, giving him a B for below target on a combination of several topics in a section when she was applying the B to only one of the topics. In fact, the B itself was not merited for even the one topic because it was based only on her assumption that plaintiff did not respect her, and therefore must not respect others. (DG dep p 201-202, App 20).

For ambiguous reason, Court (transcript p 6) makes note 2d Circuit has not

addressed hostility in the workplace under A.D.E.A. although 6th Circuit has, and finds such doctrine may be applicable, i.e., a hostile work environment based upon age. Plaintiff questions if the issue merited mention in his summary judgment hearing, and whether if its absence is significant it should be addressed by 2nd Circuit. It is curious that in plaintiff's appeal decision the 2nd Circuit's affirmation changed the words "addressed hostility" to "recognized hostility." (App 39).

District Court cites *Harris v. Forklift Systems,* 510 U.S. 17,22 (1993) finding hostility must also include altering of conditions of employment, severity and frequency of discriminatory conduct, whether the conduct is threatening, humiliating, or a mere offensive utterance, and whether the conduct unreasonably interferes with the employee's work performance.

The District Court minimizes the extent of the hostility and harassment suffered by plaintiff, and lists several plaintiff allegations (transcr. p 7) constituting the hostile work environment, perceiving these as the total of plaintiff's charges. The total of his charges are clearly represented in his 7-year history of recording notes (App 9, 42) of

events as they occurred, and number in the hundreds of examples of workplace abuses, threats, and humiliation that interfered with his work performance.

The 2nd Circuit Court of Appeals simply repeated this view of the District Court in its affirmation without any further analysis. (App 37).

Again, (transcr. p 8) the Court states plaintiff does not allege personal knowledge of Savin's critique of other employees. Plaintiff repeats he has submitted copies of other employees' performance evaluations, and copies of manuscript samples (brief opp. SJ) which clearly reflect younger employees being excused for work infractions while plaintiff was criticized. A reasonable factfinder will ascertain this disparity.

The District Court indicates (transcr. p 9) the majority of plaintiff's testimony relates only to his "perception" Savin was unfair and overly critical, and that her conduct was "facially" related to her management style and "presumably" her perception of the quality of the plaintiff's work.

These observations are mere conjectures by the Court and are refuted by the actual evidence of Savin's record showing

her age bias: Her record of hiring only those within her own age group (App. 3). Her age-related remarks to plaintiff (App 3, 49). Her record of hostility toward older employees (App 2). Her threats to plaintiff, the oldest member (App 5). At time of "false" elimination of "entire" department, her selection of all younger workers for continued employment, and others for extended termination dates (App 5). Her selection of all younger workers for later rehiring (App 5). Her enormous pervasive hostility toward plaintiff borne out by his 7-year hand-written record (App 9, 42). Her denial of plaintiff training offered to others.

A reasonable factfinder would find the above evidence more compelling than the Court's mere notion that plaintiff's experiences with Savin were based on his perception.

The Court now states (transcr. p 9) there is an issue of fact that the relationship between Savin and plaintiff had rose to one of personal animosity, based on Savin's statement she did not want to work with plaintiff, the plaintiff admitting he repeatedly argued with Savin, at times raising his voice to her, and that these actions cannot reasonably be related to harassment based on age.

A suggestion of animosity between Savin and plaintiff is more conjecture by the Court. In addition, the statements made by the Court are not accurate. Savin's actual statement on two occasions was, "I'm not going to be forced to work with you," (DG dep p 155, 236) which by analysis would be clear to the factfinder she meant something entirely different than merely not wanting to work with him. Rather, she was being advised she could not discharge plaintiff without just cause.

At no point did plaintiff admit he repeatedly argued with Savin as the Court stated. Regarding raising his voice he merely stated that on a few occasions he disagreed emphatically with her on matters. At plaintiff dep. pp 205-207 he discusses the meaning of "raising one's voice," i.e., a voice can be raised to different levels, from shouting to merely showing surprise. The Court incorrectly implies plaintiff argued and shouted with Savin regularly, which is not true.

The Court states the above actions cannot reasonably be related to harassment based on age. Plaintiff sees it based heavily on age since he did not see the younger employees treated this way. At the least, all ambiguities and inferences must be drawn in favor of the non-

moving party *(Anderson.)* In *Rattner*, if there is evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party, summary judgment is improper.

Defendant and District Court disagree with plaintiff's assertion that Savin's hiring of only younger personnel showed age bias since he had no way of knowing the ages of all job candidates interviewed (transcr. p 10). Plaintiff states this logic is without merit, that what is significant are the ages ultimately selected, all between ages 24 and 32, and finally an older person of 57, all younger than plaintiff. Savin's choices were younger candidates.

Additionally, plaintiff did not state this practice represented harassment as Court states. Plaintiff cites this practice merely as one of the indications of Savin's age bias.

In conclusion regarding the claim of hostile work environment, plaintiff repeats its severity and pervasiveness, and its serious interference with his work performance.

II) The Age Discrimination Claim Based on Initial Layoff

The Court assumes plaintiff has made a prima facie case, and states the defendant must now come forward and articulate a legitimate non-discriminatory reason for plaintiff's discharge. The Court agrees, and the plaintiff agrees (DG dep p 269) the department was downsized according to a well-documented division-level business plan.

Court states plaintiff has not come forward with evidence this plan was a sham to get rid of him because of his age. Plaintiff agrees that no rational juror could find a reduction-in-force a pretext under the circumstances of this case.

At no point did plaintiff ever state or even imply the downsizing decision was a sham to get rid of him. At no point did he ever state the reduction-in-force was a pretext. These were suggestions advanced by defendant. Plaintiff accepted the downsizing as a business fact of life and had no complaints. He began attending the John Josephs Outplacement Agency set up by the company to assist displaced workers.

Plaintiff filed his complaint with NY State Division of Human Rights and EEOC while he was in attendance at the outplacement agency, because he noticed the entire department had not been eliminated as he had been told. The entire department consisted of 11 employees. Without those employees, their equipment, supplies, and functions there would be no department. However, three of those employees (Savin, Parr, Bellomo) were not eliminated and continued to perform their functions, four of the employees (Kowalewski, Weiner, McGowan, Sherman) continued to function on extended termination date basis for up to three months, continuing to earn their livelihoods, one employee (Donati) elected to return to college, another (Harrison) chose private employ, and only two (plaintiff, the oldest), and Mirabito (a younger employee) were officially discharged immediately. Defendant wants Court to believe four, of assorted ages, were laid off immediately.

This was the sham alleged by the plaintiff, not the company's decision to downsize. It was the sham of supervisor, Savin, in misrepresenting to plaintiff the whole department was being eliminated. The sham was implemented on Mon. Aug. 30, 1993 when Savin called a meeting of the department and announced the im-

pending elimination of the department. Plaintiff had a single vacation day that day, App 4. This traumatic announcement was not shared with plaintiff when he returned the next day, nor for the remainder of the week, until Fri. Sept. 3, 1993 when he was called in and discharged. It is of particular note that her manager, Connie Whitton, was not aware of Savin's initial Aug. 30 meeting (CW dep p 47) and considered Savin's meeting unusual.

Savin took advantage of the proposed department elimination and used it as a subterfuge for getting rid of plaintiff. The sham grew with 3 employees continuing to be employed, with one technical writer designated to be a proofreader, a function for which plaintiff was more qualified. It grew further with four of the employees being kept on extended termination dates, and still further when the majority was eventually hired back.

The Court erroneously states plaintiff believes the reduction-in-force was pretext (transcr. p 11). The true pretext occurred 7-months after plaintiff filed his complaint, when the company responded to the notification of complaint by NY State Department of Human Rights. It was then that the company first articulated that the reason for discharging plaintiff

and not rehiring him was his poor performance. For evidence, they submitted some performance evaluations and work samples. Plaintiff states that for a fair and accurate review these need to be compared by reasonable jurors with documents of the other employees.

Also, on plaintiff's exit papers the company checked off "job elimination" as the reason, not the performance box, nor the cause box. In addition, in Savin's own deposition she stated she had never before considered discharging plaintiff (CS dep p 97).

Savin's deposition p 84-86 is clearly indicative of her confusion over plaintiff's performance, in her inability to understand simple questions.

The pretext of poor performance nullifies the company's legitimate non-discriminatory reason offered as the reason for plaintiff's discharge.

III) The Age Discrimination Claim Based on The Rehiring

Regarding plaintiff's claim of failure to be rehired because of his age, the Court states "there is no question as to the facts of his prior performance." (transcr. p 12).

Plaintiff calls attention to his last performance evaluation in which he wrote that Savin's comments were extreme. He further states her comments are distortions of fact, exaggerated, and untrue. (Brief in opp to SJ). In the 1992 evaluation Savin manipulated one of the sections to be graded, in her ongoing campaign to denigrate plaintiff's performance record.

The section read, "Communicates with clarity and conciseness, demonstrates respect for others, shares knowledge." Savin gave plaintiff a B for Below Target explaining that because she feels he has no respect for her he must have no respect for others, totally disregarding the entire content of the section, and distorting it with a falsehood. App 10.

The Failures of Performance Evaluations

The distortion of evaluations is not an uncommon practice. The Wall Street Journal reported (11/21/96) results of a survey by the Society of Human Resource Management, of Alexandria VA. which concluded: More than 90 percent of appraisal systems are unsuccessful. A 1993 survey by Development Dimensions International of 1,149 human-resources managers and others found overwhelming dissatisfaction.

Basic problems are: Even when a review is generally positive many seem to hear only the negatives. Many employees believe that if their boss dislikes them, they will get a bad review regardless of their work. Lawyers and human-resources officials say reviews furnish useful records to combat lawsuits. Usually a person is rated as great, then great again, then great again, then terrible, and then is fired. Rapid company changes can render reviews useless. In almost every major survey, employees and supervisors rate the process a resounding failure.

An employment editor for the Syracuse Newspapers wrote (7/20/97), Managers and supervisors are sometimes guilty of hav-

ing "selective memory". A manager might note "Did not meet requirements" without knowing all the circumstances that held up a project.

A 1995 King Features Syndicate editorial read in part: Evaluations encourage corruption at all levels. A lot of fine careers have been destroyed by evaluation reports rendered by petty, vindictive, and/or power-crazed raters. Too often, evaluation reports are used as silencers, weapons of terror or tools of reprisal by those who want to cover up their own wrongdoings.

A few well-placed words in an evaluation report have always been enough to scuttle a career. Many qualified personnel fear making the slightest error, and are in fear of the next evaluation report. The fear is they will be forced to leave because they did not have the right check mark on an evaluation. Many managers do not realize that if mistakes are not being made, decisions are not being made.

The Court makes only a general statement as to plaintiff's performance, as did the company, without any comparison with the performance of the rehired employees, which would be utmost in importance for reasonable jurors.

The Court should hear argument regarding the full meaning of performance. The technical writing function entails many aspects such as: writing ability, typing, neatness, word processing, manuscript output, rapport with internal customers, productive speed, much voluntary overtime, attendance, research into product data, obtaining approvals, communication with other departments, and other performance criteria. It is not logical for someone to be discharged simply for "poor performance", particulary one who led the department for years in overall performance (brief in opp to SJ, p 3, 4).

Plaintiff was given no opportunity to defend his performance by Human Resources or by Savin's own managers. Her whim to discharge plaintiff at will for only her own reasons was permitted. He did not approach upper management with a complaint about Savin's actions because two other employees lost their jobs under Savin when they lodged complaints. App 56.

Defendant produced a handful of innocuous affidavits indicating involvement with the downsizing, none of which showed any personal knowledge of plaintiff other than through Savin input. Most of the affidavits made a point of not admitting to making the decision not to rehire

plaintiff, and only being involved in the process leading to the decision. p 11.

The Court states it must apply the standard of the employer's view of plaintiff's performance (transcr. p 13) in deciding whether to rehire him. Plaintiff states his performance record was not fairly evaluated, particularly when viewed in the light of an extremely hostile supervisor who had threatened his job security on several occasions.

The Court additionally states that regardless of whether Savin's criticism of plaintiff is unfounded there is no indication it was based on age. Plaintiff emphasizes that her criticism was unfounded, and that her behavior pattern toward him, and toward other older employees in the past, and not toward the younger employees, was based solely on his age.

In 1992, when plaintiff was verbally critical of a Savin action, she threatened him by warning he need not expect any satisfactory performance evaluations in the future. (Plaintiff handwritten notes).

Providing strong input to those department managers who would execute the rehiring process finalized Savin's sham

and promise to rid herself of plaintiff.

IV) The Retaliation Claim

Regarding plaintiff's claim of retaliation, that the decision not to rehire him was because he filed a complaint with NY State Division of Human rights and EEOC, the Court states plaintiff's entire argument rests with the fact that a person who was a company EEO employee, was involved in the decison to rehire some of the technical writers. (transcr. p 13).

The Court and the defendant totally ignore or overlook the facts in this instance. Plaintiff did not make such a meager statement. He clearly presented in his brief opposing to summary judgment there was a strong correlation between the timing of when the company was notified of his complaint, and when the rehiring process took place, and who was involved in the decision-making process not to hire plaintiff. p 7, App 23.

Company was notified by NYSDHR of the complaint, mailed to them on 10/20/93 (Exbt J).

Company was again notified, by EEOC, of the complaint, mailed to them on

10/27/93 (Exbt K). This notice was stamped into Herb Smith's office on 11/8/93. Herb Smith was a Human Resources Officer of the company, and a Diversity Training Manager. Herb Smith was more than just a company EEO employee who was involved in the rehiring decision, as described by the Court and the defendant. A reasonable trier of fact would readily recognize that Herb Smith was an individual with great influence in this matter.

Notices to employees offering rehiring were mailed on Nov, 22, 1993 (Exbts L, M, N.), a full two weeks after the complaint notification was stamped into Herb Smith's office, and a full month after the notification by NYSDHR was mailed to the company. In *Landan*, a causal connection can be established indirectly by showing plaintiff's engagement in the protected activity was closely followed by the discriminatory treatment.

A reasonable trier of fact must clearly conclude that company retaliation based on plaintiff's age was clearly established. To establish prima facie in a failure to recall complaint, the employee must: be over 40, be qualified for a rehire position, be not recalled, with age being a contributing factor. *Franci*.

Plaintiff must show he or she possessed the basic skills necessary to perform the job. *Owens*.

Plaintiff was unmistakably qualified after 12 years as a technical writer, possessed more than the basic skills required, and age was without doubt taken into account. In *Lowe*, age need not be the principal reason, but must be a significant contributing factor. In *Parcinski*, age need not be the only factor taken into account. In *Benjamin*, the rehiring of younger persons as replacements for an aggrieved plaintiff can create an inference of discriminatory intent.

Company responded to plaintiff's complaint May 2, 1994, seven months later, stating for the first time plaintiff was released and not rehired due to poor performance (response to NYSDHR). Plaintiff exit form (Exbt E) was checked "job elimination." Boxes for "cause" and "performance" were not checked.

Savin deposition also indicated she had never considered laying off plaintiff (CS dep p 97).

Plaintiff's claim of employer pretext was clearly established by these events.

The concept of performance should be closely analyzed. Technical writing performance consists of many abilities. App 23.

It should be pointed out that retaliation did not end here, that the company added further retaliation, and obstructed plaintiff's right to trial by jury under the Seventh Amendment (p 5, App 7) when human resources manager, Chamberlain, telephoned plaintiff at his home 12/10/93 and told him:

> "I was advised you had an EEOC charge against the company and we could not process the waiver until we received notification that the charge was withdrawn."

The waiver referred to was the waiver of right to sue the company, in exchange for severance benefits. Plaintiff never received his severance pay.

Fed. R. Civ. P. 56 (also p 5)

1. Summary Judgment cannot deprive litigant of, or at all encroach upon, his right to jury trial; judges in giving its flexible provision effect must do so with this essential limitation constantly in mind. *Whitaker v. Coleman* (1940, CAS Ala) 115 F2d 305.

2. Rule 56 contemplates inquiry in advance of trial as to whether there is genuine issue and may be invoked for purpose of sham claims and defenses which obstruct prompt determination of truth, but rule cannot be applied so as to deprive litigant of his right to try any genuine issue by jury. *Curtis Publishing v. Church, Rickards Co.* (1973, ED Pa) 58 FRD, 17 FR Serv 2d 749.

3. Purpose of rule is to permit trier to pierce formal allegations of facts in pleadings and grant relief by summary judgment, when it appears from uncontrovertable facts .... there are no genuine issues for trial. *Avrick v. Rockmont Envelope*, (1946, CA10 Colo) 155 F2d 568, 69 USPQ 431.

4. Summary Judgment may be awarded only if proof is clear and convincing that no material fact remains in doubt. *Forstmann Woolen v. J.W. Mays* (1947, DC NY) 71 F

Supp 459, 73 USPQ 283.

5. Any uncertainty regarding the existence of unsolved factual issues is sufficient to deny summary judgment. *Greenbaum Mortgage v. Town & Garden Assoc.* (1967, CA7 Ill) 385 F2d 347.

6. Summary judgment should never be granted unless the facts are clear and undisputed. *Dairy Engineering Corp v. DeRaef Corp* (1941, DC Mo) 1 FRD 674, 49 USPQ 160.

7. Summary judgment is not lightly to be granted .... its use is limited to that exceptional situation where there is no genuine issue as to any material fact. *Lipschutz v. Gordon Jewelry* (1974, SD Tex) 373 F Supp 375.

8. Question of retaliation is particularly inappropriate for summary judgment disposition, since primary issue is one of intent and motive. *Romero v. Union P. Railroad* (1980, CA10 Wyo) 615 F2d 1303, 22 BNA FEP Cas 338, 22 CCH EPD § 30679.

9. Age discrimination, plaintiff's division dismantled, 9 professional colleagues reassigned within same dept., evidence of disputed issues, SJ inappropriate.*Schmid v. Frosch* (1982) 220 App DC 212 680 F2d 248,29 BNA FEP Cas 163, 29.

The Public Good

The Court should increase its support of A.D.E.A. to protect the increasing number of elder workers against growing abuses in the workplace, by more penetrating application of F.R. 56.

The Syracuse Newspapers ran and editorial 5/93 distributed by Knight-Ridder Newspapers, which said in part:

> "Age bias charges filed with federal and state agencies jumped 26% since 1990 - to 36,000 nationally last year, according to U.S. EEOC. Discrimination based on age is the fastest growing form of discrimination in the U.S. according to former EEOC Chairman, Evan J. Kemp."

Most experts cite economics, massive layoffs and the relentless aging of the American work force as the major contributors. The Age Discrimination in Employment Act of 1967 grew out of Congress' conclusion that older workers were stereotyped as less productive, more costly, less able to learn new technology and less willing than younger workers to work full time or overtime. (Evidence indicates these do not apply to plaintiff.)

Was Plaintiff's Case Jeopardized by Heavy Caseload at Summary Judgment?

Syracuse Newspapers 6/4/98 announced that the U.S. Senate confirmed the appointment of Syracuse Federal Judge Rosemary Pooler to the 2nd Circuit Court of Appeals in New York City.

District Court officials in Syracuse and Binghamton are now busy trying to develop an approach for handling the 725 civil and 145 criminal cases that Pooler has pending before her.

Two senior judges will handle requests in Pooler's civil cases that could result in a disposal of a case, such as motions for dismissal.

Three active judges each now carry an average of 830 cases. The national average is 470 cases per judge. The district's caseload is in the top 10 heaviest in the country's 92 federal district courts. In the past, it has taken about two years for a search committee to find replacement candidates, make recommendations to the U.S. senator making the nomination, and for the nominee to win Senate approval.

The district's other federal judge vacancy has been open for six years, with

the nominee failing to get the approval of the Senate Judiciary Committee.

Plaintiff has been aware from the beginning of his case of the desire of the District Court to move cases through. At an early pre-trial conference he was advised by the magistrate judge to keep an open mind to offers of settlement, in view of the fact that the President and the Senate have not acted for some time on the Court's need to fill some vacancies. Showing concern for the amount of time involved in hearing cases, the judge also asked plaintiff how long he thought his case might last. Plaintiff responded, "About 3 or 4 days."

Plaintiff states that the haste in which his summary judgment hearing was handled indicates the Court may have reacted to its need to dismiss some of its case volume, as discussed above.

Of incidental interest, the plaintiff states that a bona fide offer of a settlement never rose to date over this five-year period. Plaintiff was also told during the first year of trial preparation that defendant had remarked defendant would not offer another nickle in view of defendant's costs to date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DANIEL J. GREY, Plaintiff,	No. 94-CV-1126
v.	**MEMORANDUM AND ORDER**
CARRIER/UNITED TECHNOLOGIES CORPORATION, Defendant	(Held June 13, 1997) (Filed June 30,1997)

From Transcript:

"We have eight causes of action, actually four duplicated, four under A.D.E.A. duplicated under NY State Human Rights Law. Defendant brings motion for summary judgment as to all causes of action and costs."

"The majority of plaintiff's testimony relates to his perception that his supervisor's critique was unfair and overly critical. Facially, this conduct is solely related to her management style and presumably her perception of the quality of plaintiff's work."

"Even considering all the inferences in favor of the plaintiff, at best, there is

an issue of fact as to whether the relationship between plaintiff and his supervisor had rose to one of personal animosity. Her statement she did not want to work with him would be consistent with such an inference."

"Even if there were some sort of conflict between supervisor and plaintiff, there is no indication or permissible inference it related to age."

"Thus, all the hostile conduct described which relates to plaintiff's work cannot reasonably be considered age harassment."

"I am going to dismiss (defendant's ?) motion with respect to hostile work environment."

"The defendant has come forward with a legitimate non-discriminatory reason for discharging plaintiff, that of a legitimate department elimination."

"The defendant has come forward with a legitimate non-discriminatory reason for not rehiring plaintiff, that of a poor performance record."

"In view of all the facts and evidence before this Court, it cannot find evidence to support plaintiff's claim on retaliation, and dismisses that claim."

Defendant Carrier/United Technologies Corporation having moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for the entry of summary judgment dismissing plaintiff's complaint in this matter in its entirety, and the Court having heard Hancock & Estabrook, LLP (David E. Peebles, of counsel) in support of that motion, and Donald Keinz, Esq., in opposition thereto, and; upon deliberation;

NOW, the Court having rendered a decision from the bench on June 13, 1997 finding, inter alia, there exists no genuine issue of material fact requiring trial, and that defendant is entitled to judgment as a matter of law on each of plaintiff's eight federal and state claims, it is therefore hereby

ORDERED, defendant's motion for summary judgment dismissing plaintiff's complaint be and is granted; it is further

ORDERED, the court clerk is directed to enter judgment in this action dismissing plaintiff's complaint in its entirety.

s/ _____
Hon. Frederick J. Scullin, Jr.
U.S. District Judge
Dated: June 30, 1997
Syracuse, NY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NDNY/SYNY
94-CV-1126
Scullin

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RESJUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of March, one thousand nine hundred and ninety-eight.

PRESENT:

Jon O. Newman,
Jose' A. Cabranes,
Gilbert S. Merritt,* *Circuit Judges.*

DANIEL J. GREY, Plaintiff-Appellant

v. No. 97-7988

UNITED TECHNOLOGIES CORPORATION, also known as United Technologies Corporation/ CARRIER CORPORATION, Defendants-Appellees

Appearing for Appellant:
Anthony P. Belletier, Syracuse, NY

*Of U.S. Court of Appeals for 6th Circuit, sitting by designation.

MANDATED 5/25/98

APPEARING FOR APPELLEE: DAVID E. PEEBLES, Hancock & Estabrook, LLP Syracuse, NY

This cause came on to be heard on the transcript of record from the U.S. District Court for the Northern District of N.Y. (Frederick J. Scullin, *Judge*) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff Daniel J. Grey alleges that defendants violated the federal Age Discrimination in Employment Act (A.D.E.A.), 29 U.S.C. § 621 et seq., and the N.Y. Human Rights Law (NYHRL), N.Y. Exec. Law § 290 et seq., by dismissing him because of his age, failing to rehire him because of his age, retaliating against him for filing an administrative complaint alleging employment discrimination, and creating what he styles as "a hostile work environment based on age." The district court entered summary judgment for defendants as to both the federal and state claims. Substantially for the reasons stated by the district court, we affirm.

We note that this Circuit has not

previously recognized a hostile work environment cause of action under the ADEA, nor have the New York courts recognized such a cause of action in regard to age discrimination under the NYHRL. However, in this case we need not decide whether the ADEA or the NYHRL contemplate a hostile work environment cause of action for age discrimination beause we agree with the district court that plaintiff has failed to adduce sufficient evidence to support his claim that the harassment allegedly directed against him was based upon his age. Moreover, we find that the isolated and ambiguous comments allegedly directed against him by his supervisor, which he claims created a hostile work environment, would, in any event, not be "severe or pervasive enough to create an objectively hostile or abusive work environment...." *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993).

For the Court,
George Lange III, Clerk
by s/Lucille Carr

United States Court of Appeals
For the Second Circuit

Daniel Grey, Plaintiff/Appellant/
Petitioner, v.
United Technologies, et.al. (short title)

NOTICE OF MOTION 97-7988

For Extension of Time To File
Petition for Rehearing

MOTION BY: Anthony P. Belletier, Esq.
204 E. Jefferson Street
Syracuse, N.Y. 13202

OPPOSING COUNSEL: David Peebles, Esq.
Hancock & Estabrook
One Mony Plaza
Syracuse, N.Y. 13202

Request: Extension of time within which to file a Petition for Rehearing on grounds that petition was filed 3/30/98 and judgment from which a rehearing was requested was filed 3/13/98. Counsel for Petitioner was on vacation out of state from 3/12/98 through 3/24/98, was engaged in trial on 3/26/98, could not file petition sooner.

s/ Anthony P. Belletier, Esq. 3/31/98
Appearing for Daniel Grey, Plaintiff

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted nunc pro tunc.
New petition deadline date is 4/21/98.
FOR THE COURT: GEORGE LANGE III, Clerk
by: s/ Beth J. Meador, Admin. Atty. 4/7/98

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

GEORGE LANGE III
CLERK

At a stated term of United States Court of Appeals for Second Circuit, held at United States Court House, Foley Square, in City of NY, on 18th day of May, one thousand nine hundred and ninety-eight.

Present:

Hon. Jon O. Newman, CIRCUIT JUDGE
Hon.Jose' A. Cabranes, CIRCUIT JUDGE
Hon. Gilbert S. Merritt, CIRCUIT JUDGE*

Grey, Plaintiff-Appellant

v.

United Technologies, Defendant-Appellee

Docket No. 97-7988

A petition for rehearing having been filed herein by the Appellant, Daniel J. Grey. Upon consideration thereof, it is Orderd that said petition be and it hereby is **DENIED.**

For the Court: George Lange III, Clerk

By: s/ Beth J. Meador

Admin. Atty.

*Of U.S. Court of Appeals for 6th Circuit, sitting by designation.

CASE-RELATED TOPICS

1. *Examples of Hostility*: (samples heavily documented in plaintiff notes).

a. Company president Bill Wilson called for the first employee satisfaction survey to be completed. Mike Smoral division head enouraged everyone's participation. Technical Writing had only 5 members at the time. Plaintiff had a vacation day when survey forms were given to his department. After 2 weeks passed plaintiff asked a coworker if she heard anything about the survey forms. She said they received them 2 weeks ago and sent them through. Plaintiff called Smoral's office and was told 5 survey forms were dropped off and none were left. He obtained a copy from human resources and sent it air express within the deadline. Plaintiff believes Savin deliberately kept the survey form from him expecting he would make critical comments about her supervision. Plaintiff included a comment that supervisors should check that all employees receive survey copies in the future. That practice seemed to be installed later.

b. Plaintiff used a PC along with a typewriter. Savin told him the typewriter would have to go soon. One day, while operating the typewriter, she barged into his office without a word, snatched the

typewriter from his table and deposited it outside the office for pickup.

c. While assisting an engineer with research from the obsolete file, Savin nudged plaintiff aside and told him not to go near those files again because they were Angela's. He had been using them for years. It was not a dept. announcement and he never saw Savin push aside any of the younger writers.

d. While discussing something for a 1/2 hour with Savin in her office she was looking down at her desk for several minutes. Plaintiff felt the meeting had ended and started to rise. She suddenly snapped, Where are you going? Plaintiff said, Oh I thought the meeting was over. She said, Sit down, I'll tell you when it's over. When he sat down she said, Now it's over.

e. Savin came to plaintiff's office to ask a question and his phone rang. He reached for the phone and she said, Don't touch that phone. He didn't. She had no concern whether it might have been a personal or business emergency.

f. At a division meeting in the auditorium, as plaintiff's dept. entered a row of seats, it appeared Savin needed to move in a seat to make room for plain-

tiff who was at the far end. Bellomo told Savin they needed to slide in one more seat and Savin shouted, He can sit anywhere he wants.

g. On two occasions Savin told plaintiff, I'm not going to be forced to work with you.

h. Savin once threatened plaintiff with, I guess you know what that comment will do for your next performance review.

i. At the start of the 1990 performance review Savin told plaintiff, Before we start I just want to say your salary increase will be coming through. Plaintiff thanked her. There were some performance disagreements. 15 minutes later Savin came to his office and said, I made a mistake regarding your salary increase. I didn't realize there was a correlation between reviews and salary increases, so your increase won't be coming for a while. He never received an increase after that.

j. On different occasions, Savin told plaintiff he was sneaky, had a temper, was over-sensitive, and told lies.

k. On two occasions Savin accused plaintiff of telling engineers and product mgrs. she was holding up their projects.

l. On one occasion Savin told plaintiff he told an engineer she was sitting on one of his projects. He had not. He told the engineer that when he finished with a project it went to Savin and Bellomo for a final approval before going to art dept., so it would be best to check with them. Savin pointed her finger at plaintiff and said, No, you told him we were holding it up, and for that matter it went to the art dept. on Friday. Plaintiff knew it had not because he saw it on her desk over the Labor Day weekend when he worked overtime. On Tues. he checked the art dept. log sheet and saw it had just been logged in that day (Tues.).

m. Savin asked plaintiff if he had checked everything on a project. He said he didn't check everything cover to cover but did check the physical data. She said she didn't mean that. She meant, Did he check everything affected by the changes. he said, No, but had asked the application engineer and product mgr. if they had any further changes. She said he didn't have to do that, it wasn't a reprint job. He said, He knew that but checked them anyway. Savin smirked at plaintiff. He said he did check to see if the changes affected anything else. She said, Are you sure, it sounds as though you didn't. He said if you want me to check again I will. She walked out.

n. Savin told plaintiff to leave a note when he had a med. appt. stating time left and time of return because she had no way of knowing if he returned. In 17 yrs. with company he never failed to return from a med. appt. She also told plaintiff to leave a note if he would be away from his desk for more than 15 minutes. This frequently made it difficult to use the restroom.

o. Regarding a proofreading note, Savin asked plaintiff why he addressed the hard-wire kit and not the proofreading note. He was asked questions such as, Why did you answer the wrong note? Did you read it right the first time? She engaged in bit-by-bit badgering of plaintiff's thought process then walked out shaking her head.

p. Savin told plaintiff he didn't turn in his vacation time tracking slip, a new procedure. He said he gave her his full vacation schedule. She said, No not that, I'm talking about off-time tracking, you're not familiar with that? He said, Yes, it was covered at the last meeting. She said, Right. He said, No, I didn't relate that to vacation time. She said That's exactly what it's for. Plaintiff said O.K. She said, What do you mean O.K. He said O.K. means O.K., understood. She was extremely hostile over a minor cleri-

cal omission.

q. Savin told plaintiff a Bryant UK project he did was wrong. He checked the artwork and it was right. The printer had not re-shot a figure as requested.

r. On 30HW-1APD proofreader suggested 5.6C not 6C. Plaintiff checked marketing and was told they wanted to round off and use 6C. Savin told plaintiff he shouldn't ask, Do you want it this way or that way. He said he didn't ask that. He asked if there was a marketing reason they wanted to round it off. She was implying plaintiff did not know how to communicate.

s. Two of plaintiff's silverprints were on the shelf for 2 days, both rush jobs. Proofreader was out ill. Savin merely shrugged her shoulders when plaintiff inquired. Plaintiff said anyone could have proofread them to help out.

t. Savin criticized plaintiff for sending his personal data direct to a coordinator rather than through Angela. Angela had complained. He felt personal data should not be passed through co-workers' hands and Savin should have exercised better control over personal data.

u. Savin handed plaintiff his paycheck with a smirk and gesture to indicate he

didn't deserve it. Plaintiff thanked her.

v. When an engineer was checking a project in plaintiff's office Savin stood behind a partition staring over engineer's shoulder to see if plaintiff was allowing engineer to mark up the work.

w. Savin agreed with engineer that plaintiff's combining of 2 troubleshooting books held up both jobs. It did not and saved company considerable cost. (GN,GT). Not the slighted recognition for effort.

x. Savin accused plaintiff of "camouflaging" approval signatures. He suggested she not use untrue negative comments in work discussions, that "camouflage" means deliberate concealment. She said, Don't tell me what to say and what not to say.

y. When plaintiff was about to enter Savin's office to ask a question she saw him coming and slammed door in his face.

z. When a product mgr. did not have time to check his project he asked if we could pass it through to the art dept. and he would check it later. She told plaintiff to tell him No, and told plaintiff to mark the signoff sheet, Mktg. waives its right to review - forcing plaintiff to falsify the record.

2. *Age-Related Remarks*:

a. Savin said plaintiff was unwilling or unable to modernize his practices, the implication being he was of the old school. Plaintiff states this was a tactic to denigrate his performance. Kloster, in affidavit, repeated this verbatim, showing he copied her thought. Kloster had no personal knowledge of plaintiff other than signing his last review form as Savin's mgr.

b. When plaintiff asked Savin a business question she replied, I don't have time to go over these things with you. I'm too busy training the younger writers. This told plaintiff she created a distinction between the young and older workers.

c. At a birthday cake celebration for two younger writers, someone asked how old they were. Savin said, For those who can still mention their ages. Plaintiff felt singled out as older and a person unwilling to mention his age.

d. In a meeting with Savin she asked plaintiff why he couldn't respond to questions the way the other writers did, that he seemed to be forgetful. Plaintiff was used to being snapped at in discussions with Savin and said he was only

considering the question and the right response.

e. Savin told plaintiff he was slow preparing manuscripts. Plaintiff states he is extremely fast writing and typing and getting approvals. If manuscripts are late it has been due to Savin sitting on project requests rather that giving them to plaintiff right away, and also Savin giving proofreading priority and art dept. priority to the younger writers, and holding up plaintiff's work.

District Court stated and Court of Appeals agreed these were only innocuous and stray remarks and were not pervasive. Plaintiff states he felt these remarks deeply, they caused him tension, a feeling of being threatened, and interfered with his daily work performance. Plaintiff states it is not important how many remarks are made because even one remark can have serious results. What is important is the mind-set and the intent of the supervisor which was clearly pervasive over a period of years. Court of Appeals said (App 39) plaintiff claims Savin's isolated remarks created a hostile work environment. Plaintiff did not make that claim. It was Savin's overall behavior that created it. It was apparent when Savin harassed Doran, Lehman, and plaintiff, forcing all 3 out of their

jobs, that Savin was cloaked in a pall of age discrimination for years. Merely because she did not make discriminatory remarks every day does not indicate she was not discriminatory. Her everyday behavior and attitude toward older workers, compared with younger workers are the main measure. Even silence toward an older worker without the abuse of remarks is age abusive. In *Gallo*, 2nd Circuit declared that when deciding whether the "drastic provisional remedy" of summary judgment is granted in discrimination cases, there must be additonal considerations.

> A trial court must be cautious about granting summary judgment when an employer's intent is at issue .... Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.

At least one court has viewed the decision in Gallo as having " 'all but outlawed the use of summary judgment' in employment cases, at least where an employer's intent is at issue." *Peele*.

To establish prima facie in age dis-

crimination, plaintiff must show that he; was over 40, qualified to assume a position that remained after the reduction in force, was discharged and not rehired, and others not in protected class were treated more favorably, giving rise to an inference of age discrimination. As stated in Maresco at 111:

> In the context of a consolidation or reduction-in-force, where the employer is concededly engaged in a process that will legitimately result in the elimination of some positions, an employee must establish not that he was qualified for his previous position that has been eliminated, but rather that "he was qualified to assume another (available) position at the time of the discharge." (citations omitted).

At the time plaintiff's position was eliminated, after being told the whole department was being eliminated, he held the skills to be a proofreader, a position offered to a younger, less qualified writer (Parr, two grade levels below plaintiff). Even that position never materialized as practically the entire department was reinstated under another division with technical writers rehired as technical writers, but not plaintiff.

3. *Too Many Errors*:

In deposition, Savin said plaintiff made too many errors. She was asked what she meant by too many errors. She said, In manuscripts he made a lot of errors. She did not actually answer the question posed. Plaintiff states there is no such thing as a general statement of too many errors. It was only a perception Savin wanted to create, to support her response of poor performance to NYS Division of Human Rights. On a few occasions Savin held up some proofreading sheets and told plaintiff, These are too many errors. All technical writers know that proofreader comments often include many questions by the proofreader for her own understanding that she wants the writer to check with the engineer.

These are not errors. There has never been an established guideline that indicated how many errors were "too many." Manuscripts vary in size, some are one page and some over 50 pages. Many errors are mere spelling errors, or punctuation errors, which at other companies would be corrected automatically by the proofreader without calling them to the attention of the writer. Savin insisted the proofreader mark down every question, every correction, every observation, right or wrong, so that Savin could oversee the

minutest detail and deprive the writer of any sense of professionalism in his or her work. Savin used the proofreading process as a means of badgering plaintiff, looking for deficiencies, and holding up his work.

The appearance of too many errors also materialized in Savin's own proofing notations. A proofreader can write observations on one or two sheets. Savin used her large handwriting style to fill out many sheets with overinflated commentary that can take an entire day including overtime to analyze, and another day to check her comments with engineers and product mgrs.

Example: Plaintiff wrote an installation instruction in concert with the engineer for a small portable room air conditioner simply designed for a non-technical person such as a working parent. The instruction advised the customer to tilt the unit slightly to the outdoors to avoid dripping of condensation into the room, and to test the tilt by placing a round pencil on top of the air conditioner cabinet so that it rolls toward the outdoors. When Savin read this she told plaintiff it was a ludicrous idea because she checked throughout the department and could find no round pencils, therefore concluded the customer would

also not be able to find a round pencil. Plaintiff explained the customer would find another round object as long as the concept was understood. Objects that would work would be a round lipstick case, a ballpoint pen, a small round toy, or another similar item. Savin said she didn't like any of the ideas and told plaintiff to tell the engineer we should only inform the customer to tilt the air conditioner slightly to the outdoors to avoid condensation dripping indoors. The engineer said, Ok, let's finish it up.

4. *Grievance Redress Within Company*:

There were various avenues of redress within the company for employees to express grievances. Plaintiff chose not to use these for fear of reprisal. He knew of 2 co-workers who had taken complaints to human resources and ended up losing their jobs, one out of the company, the second to another department. Some of the avenues for redress were a Dialog program, an Ethics manager, an Ombudsman, an employee satisfaction survey, and private consultation with human resources. It was also possible to be anonymous, but plaintiff did not believe this would be effective because Savin would have to be investigated and would know who complained.

Plaintiff chose to complain in employee satisfaction surveys, but left them anonymous. On one he suggested that supervisors be required to check that all of their employees receive a copy of the survey form. Plaintiff believes his message was heard because the following year this was done in the department.

On his final performance review he pointed out that he felt his supervisor's comments were untrue, extreme, and exaggerated, that he considered himself an exemplary employee. In two months, plaintiff was also out of his job.